him to keep and deal with the goods as his own. If the bailee has acted in good faith, A should be without remedy against him. In *Newman* v. *Newman*, L. R. 28 Ch. D. 674, a trustee who received from the *cestui que trust* a relinquishment of the latter's equitable claim, without notice of a prior assignment by the *cestui que trust* to A, prevailed against A. The right of the bailee would seem to be indistinguishable in principle from that of the trustee.

The decision in *Nicholson* v. *Harper*, [1895] 2 Ch. 415, is, however, inconsistent with the doctrine here mentioned. The bailor, after selling to A certain goods in the possession of a warehouseman, persuaded the latter to loan him money on the security of the goods. Mr. Justice North decided that the innocent warehouseman must deliver the goods to A without getting repayment of his loan to the bailor. The case was argued and decided wholly upon the effect of the Factors Acts, which were rightly held not to help the warehouseman. But the real strength of the bailee's case, that A was a mere assignee of the bailor's chose in action, seems not to have occurred to the court or counsel. If a bailor should pledge goods for present and future advances, and then sell them to A, and after the sale receive further advances from the pledgee, who had no notice of the sale to A, would the court say that A, in order to get the goods, must repay the money loaned before, but not the money loaned after the sale by the bailor? No such distinction ought to be made, and it is difficult to believe that it would be made.

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# RECENT CASES.

ADMIRALTY — DAMAGES IN TORT — ONE THIRD OFF NEW FOR OLD. — In a collision of two ships equally in fault, one suffered so that new parts were necessary. *Held*, that the damages must be estimated at the full value of the new parts rather than by deducting one third the cost of the new as of more value than the old parts before the accident; that the rule one third off new for old was applicable to insurance as a contract liability, but did not apply to torts, for the injured party must not be put to expense in order to be re-established. *The Munster*, 12 *The Times* L. R. 264.

The distinction is settled law; and the universal law of appraising costs of repair in insurance is not applied to injuries arising from negligence and causing liability in tort. *The Gazelle*, 2 W. Rob. 281; *The Clyde*, Swabey, 24; *The Pactolus*, *Ibid.* 124. The American law follows the English. *The Baltimore*, 8 Wall. 386. Though the real obligation in either case is to pay for the actual damage only, it is more equitable that the party in fault should pay for the unavoidable increase in the value of the property by the new materials, than that the innocent owner should have to pay to be in as good a position as he held at first.

AGENCY — DUTY OF SOLICITOR AS OFFICER OF COURT. — *Held*, that a solicitor, on connecting himself with proceedings whereby a fund had been obtained out of court should investigate and see that the court has been informed of everything necessary for a proper disposition of the matter before it. For failure to do so he must make good a loss that could have been prevented by prompt action, though there was nothing to lead him to suspect anything wrong. *The Chancery Forgery Case* (*Marsh* v. *Joseph*), 12 *The Times* L. R. 255, 266. See NOTES.

BANKRUPTCY — BANKRUPT'S DEBTOR — BANKRUPT'S RIGHT TO SUE. — An assignee in bankruptcy under the Bankruptcy Act of 1867 was appointed for plaintiff after this action of assumpsit had been begun. The assignee did not enforce plaintiff's claim against defendant, and the assignee's right to enforce it was now barred under § 5057 of the Bankruptcy Act. It was urged for defendant that by the assignment in bankruptcy a bankrupt is divested of all right to sue his debtors. *Held*, that "notwithstanding the assignment under the Bankruptcy Act, there is left in the bankrupt

a right which makes a title good against all the world except his assignee and creditors," and that plaintiff is therefore entitled to prosecute this action. *Lancey* v. *Foss*, 33 Atl. Rep. 1071 (Me.).

This decision is unexceptionable. The Bankruptcy Act is silent on the question here presented; no common law principle requires a different decision of the point; in point of natural justice the argument is altogether in favor of the decision as made. "It is no defence to the debt that the creditor has become a bankrupt; and if an assignee, after notice, permits a pending suit to proceed in the name of the bankrupt for its recovery, he is bound by any judgment that may be rendered." Per Waite, C. J., in *Thatcher* v. *Rockwell*, 105 U. S. 467. In *accord* with the principal case, see *Sawtelle* v. *Rollins*, 23 Me. 196; *Conner* v. *Southern Express Co.*, 42 Ga. 37; *contra*, *Mounts* v. *Manhattan Co.*, 41 N. J. Eq. 211; on an earlier Bankruptcy Act, *contra*, *Berry* v. *Gillis*, 17 N. H. 9; *Deaderick* v. *Armour*, 10 Hump. 588.

BILLS AND NOTES — ALTERATION — PRESUMPTION. — Where the plaintiff sought to recover on a note bearing evidences of alteration, *held*, that he must show that the alteration took place before negotiation by maker. The rule applies to all alterations of written instruments that there is no presumption as to the time they were made. *Goodin* v. *Plugge*, 71 Fed. Rep. 931.

Here is an unequivocal statement of the general rule which it is believed represents the existing state of the law both in England and in this country. The American courts have, to be sure, spoken strictly with reference to each case as it came up, but the decisions taken together completely bear out the broad doctrine laid down. *Hills* v. *Barnes*, 11 N. H. 395 (promissory note); *Ely* v. *Ely*, 6 Gray, 439 (deed); *Crossman* v. *Crossman*, 95 N. Y. 145 (will); and see 1 Greenleaf Ev. 564. In England there is a seeming confusion, bills and notes being the only instruments to which the rule of the principal case is in terms applied. Stephen's Digest, Ev., art. 89; *Johnson* v. *Duke of Marlborough*, 2 Stark. 313. It is submitted, however, that the apparent difference in the rules regarding these and other documents is a matter of phraseology only, and that the effect is simply that the plaintiff must always make out his case. Clearly that is all that a presumption of alteration subsequent to execution amounts to. *Cooper* v. *Beckett*, 4 Notes of Cases, 685; *Williams* v. *Ashton*, 1 Johns. & Hem. 115; and in *Doe* v. *Catomore*, 16 Q. B. 745, relied on to show that an alteration in a deed is presumed to be before execution, the remarks are only dicta, the jury having been directed to judge from the deed itself.

BILLS AND NOTES — ANTECEDENT DEBT — PAYMENT BY NOTE. — *Held*, that taking a note does not operate as an absolute payment of an existing debt. *In re Scott*, 24 N. E. Rep. 1079 (N. Y.).

The decision is so clearly in accordance with the overwhelming weight of authority that it seems somewhat singular that the court should have been so evenly divided. As an original question, something perhaps might be said in support of the view that receiving a note from a debtor should have the same effect as receiving a specialty, and discharge the prior obligation. But it has long been well settled in England, and in most American jurisdictions, that merely taking a note is presumptively only a conditional payment of a pre-existing debt. While the note runs, the right of action on the original claim is suspended, but it revives if the note is not paid at maturity. In a few States — Maine, Vermont, Massachusetts, Indiana, and Louisiana — a contrary presumption prevails, to the effect that the execution of a note is an absolute discharge of prior indebtedness. Everywhere these presumptions are rebuttable by evidence; if the parties show an intention that the debt shall or shall not be completely extinguished by the note, such intention will be given effect.

CONSTITUTIONAL LAW — CITY ORDINANCE — STATE DISCRIMINATION. — *Held*, that an ordinance requiring all peddlers who were not residents of the city, selling goods within the city, to pay a license tax, is in violation of the Constitution of the United States, art. 4, § 2, providing that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." *McGraw* v. *Town of Marion*, 34 S. W. Rep. 18 (Ky.).

This decision seems open to doubt. A statute drawing a discrimination strictly upon State lines is opposed to this clause of the Constitution. Cooley on Taxation, 99. But the present case is somewhat different. Here the exemption from tax applies, not to the entire Commonwealth, but only to a very small fraction of it; Kentucky as a whole derives no benefit from the exemption. Can it be said that the citizens of other States are deprived of any privileges which the citizens of Kentucky enjoy? The other difficult question, as to whether the ordinance was repugnant to the grant by the Constitution to Congress of the power to regulate interstate commerce, was not touched upon by the court. *Emert* v. *Missouri*, 156 U. S. 296.

CONSTITUTIONAL LAW — COLLATERAL ATTACK — DE FACTO OFFICERS. — To an indictment for offering a bribe to a city commissioner the defendant demurred, on the ground that the act under which the officer was performing his duties was unconstitutional and void. *Held*, that the constitutionality of the act could not be attacked collaterally before its validity had been decided by an authoritative decision in the courts of the State. Shanck, J., dissenting. *State* v. *Gardner*, 42 N. E. Rep. 999 (Ohio).

This is interesting as a case of first impression in the State on a doubtful point of law. The maxim that there can be no *de facto* officer unless there is a *de jure* office, which is illustrated by the leading case of *Norton* v. *Shelby County*, 118 U. S. 425, is repudiated, and that case is distinguished. The decision is in *accord* with *State* v. *Carroll*, 38 Conn. 449, and shows the probable tendency of the courts in this direction. The case is valuable for the closely reasoned opinion of Spear, J.

CONSTITUTIONAL LAW — INDEMNITY FROM TAXATION. — A charter granted in 1856 exempted a bank from taxation. In 1870 a constitutional provision was adopted which prohibited such exemption. The bank failed in 1869, and in 1880 by order of court the receiver sold the charter at auction, T. being purchaser. But the shares of stock were not transferred to T. by the owners. T. and others organized and carried on business, claiming to act under the charter, and were recognized as a corporation in 1881 by the passage of a legislative act changing the corporate name. Suit by the State for the collection of taxes. *Held*, that the exemption was a personal privilege in favor of the corporation specifically mentioned, which did not pass with the sale of its charter. *Bank* v. *Tennessee*, 16 Sup. Ct. Rep. 461.

The court doubts the validity of the sale of the charter, and the effect of the subsequent reorganization, but bases its opinion upon the ground that the present organization is not in fact or in law the body originally incorporated. The decision accords with the established rule of the Supreme Court. See especially *Memphis County Commissioners*, 112 U. S. 609, at 619, 623, and cases cited. It is interesting to think how the court which decided *New Jersey* v. *Wilson*, 7 Cranch, 164, might have dealt with such a question.

CONTRACTS — DIVISIBILITY — ACCEPTANCE OF PART PERFORMANCE. — Under a contract to deliver several lots of cloth at different dates, the vendor delivered only the first lot; which the vendee accepted, though previously informed that the remaining lots could not be delivered according to the contract. *Held*, that the contract, though originally entire, had been so divided by the acts of the parties, that the vendee was liable on the contract for the lot he had accepted. *Silberman* v. *Fretz*, 14 New York Law Journal, 1697. See NOTES.

CONTRACTS — MARRIAGE A VALUABLE CONSIDERATION. — The defendant, before his marriage and in consideration thereof, in pursuance of an oral agreement, conveyed his real estate to a third party, in trust to reconvey it to himself and his wife after marriage, this being done by him to defraud his creditors, but the wife being innocent. This action is brought by a creditor to have the conveyance set aside. *Held*, that marriage was sufficient consideration to support the grant. *State ex rel. Harrison* v. *Osborne*, 42 N. E. Rep. 921 (Ind.).

However undesirable it may seem, it is undoubtedly law that marriage is a valuable consideration, and will support an ante-nuptial grant to the woman, even if made to defraud creditors. 1 Bishop's Law of Married Women, §§ 780–782, and cases cited. This view seems irreconcilable in principle with another doctrine equally well settled in the United States, viz. that a post-nuptial grant made in consideration of marriage and in fulfilment of an oral ante-nuptial agreement is void as against creditors. *Manning* v. *Riley*, 52 N. J. Eq. 39; Browne on the Statute of Frauds, § 223, and cases cited. The cases of the latter class might well be assimilated to those of the former, as the grant is in them no more voluntary than when made before marriage in pursuance of a non-enforceable agreement. 1 Bishop's Law of Married Women, §§ 810, 811; *Hussey* v. *Castle*, 41 Cal. 239; Ames's Cases on Trusts (2d ed.), § 7, note 1, p. 181.

CONTRACTS — STATUTE OF FRAUDS — PART PERFORMANCE. — Defendant made an oral ante-nuptial agreement with his intended wife that, in consideration of their marriage and of his having charge of her infant son, the plaintiff, during his minority, he would in his will devise to this son and any children of their marriage in equal shares. The marriage was consummated, and the husband took control of the boy. Three children were born of the marriage. The husband died, making no provision for the plaintiff, who thereupon brought this action for a specific enforcement of the contract. *Held*, that marriage was a sufficient part performance to render the contract enforceable in equity. *Nowack* v. *Berger*, 34 S. W. Rep. 489 (Mo.).

The court might have found other grounds on which to rest their decision, but they base it squarely on the sufficiency of the marriage. This is *contra* to the entire weight

of authority, the opposite doctrine prevailing, though much regret is expressed that it should be law. *Ungley* v. *Ungley*, L. R. 4 Ch. D. 73; Browne on the Statute of Frauds (4th ed.), § 459. This case is one of first impression in Missouri, and is a step in the right direction.

CORPORATIONS — ATTEMPT AT INCORPORATION — PARTICIPANTS LIABLE AS PARTNERS. — Action against the defendants as partners on a note signed by the Florida &c. Co. The defence was that the defendants were not a partnership, but a corporation organized under the laws of Tennessee. *Held*, that though on the facts the defendants are not a corporation *de jure*, *de facto*, nor by estoppel, they are liable as partners. *Duke* v. *Taylor et al.*, 19 So. Rep. 172 (Fla.).

It is well established that the individual members of such an association are liable in some form of contract action. But is a partnership the necessary legal consequence of an attempt like this at incorporation? It certainly is not. The participants may be liable as joint principals on the ordinary principles of contracts and agency, and it was so held in *Johnson* v. *Corser*, 34 Minn. 355, and the recent case of *Roberts Mfg. Co.* v. *Schlick*, 64 N. W. Rep. 826 (Minn.). It might be a matter of great practical importance whether defendants are liable as partners or not; for instance, if the association should become bankrupt, the bankruptcy rule of firm assets to firm creditors and separate to separate would apply should the defendants be treated as a partnership. In *accord* with the principal case, see *Martin* v. *Fewell*, 79 Mo. 401, and *Farnum* v. *Patch*, 60 N. H. 294, 324–330.

CORPORATIONS — "COMPANIES ACT" — COLORABLE SHAREHOLDERS. — Action against two, promoters and shareholders of a corporation, on debt due from corporation for services. There were seven shareholders, the minimum required by the "Companies Act," none of whom held more than one £1 share except the two defendants, who owned about £3,000. *Held*, that an action does not lie directly; at least, corporation must certainly be joined. *Broderip* v. *Salomon*, [1895] 2 Ch. D. 323, distinguished; *Munkittrick* v. *Perryman*, 12 *The Times* L. R. 232. See NOTES.

CRIMINAL LAW — FUGITIVE FROM JUSTICE — INTERSTATE RENDITION. — Defendant was extradited from Illinois for an act of burglary, and was committed for trial. Later, the prisoner was arraigned and convicted on an information for another and different charge of burglary. *Held*, that notwithstanding his objections, a prisoner may be prosecuted for any indictable offence committed within the borders of a State, without first having had an opportunity to return to the State by which he has been surrendered. *In re Petry*, 66 N. W. Rep. 308 (Neb.).

This point is fully discussed in the important case of *Lascelles* v. *Georgia*, 148 U. S. 537. It is there held that fugitives from justice have in another State no right of asylum in the international sense. If, as is generally admitted, a fugitive from justice may be kidnapped or unlawfully abducted from the State of refuge, and be thereafter tried in the State to which he is forcibly carried without violating any immunity secured to him by the Constitution or laws of the United States (*Mahon* v. *Justice*, 127 U. S. 700), it is difficult to understand upon what sound principle can be rested the denial of a State's authority or jurisdiction to try him for another and different offence from that for which he was surrendered. The conflict of authority on this point has arisen from a failure to distinguish the rule regarding international extradition laid down in *U. S.* v. *Rauscher*, 119 U. S. 407, from interstate rendition.

CRIMINAL LAW — LARCENY — CONTINUING TRESPASS. — *Held*, that one stealing goods in Canada and bringing same into Vermont is guilty of larceny in Vermont, on the ground that the legal possession of the property remains in the true owner, and, the taking being felonious, that every asportation is a fresh taking. *State* v. *Morrill*, 33 Atl. Rep. 1870 (Vt.).

The anomalous doctrine of continuing trespass, by which one who had stolen goods in one county in England was held to have committed larceny in every county into which he took the stolen goods, was not extended to cover the case of one who stole goods in a foreign country and brought them into England. *Regina* v. *Anderson*, 2 East P. C. 772; *Rex* v. *Prowes*, 1 Moody C. C. 349. The principal case, following an earlier Vermont case (*State* v. *Bartlett*, 11 Vt. 650), makes this logical extension of the anomalous doctrine. The weight of authority is against the principal case, even in jurisdictions adopting the anomaly as regards stolen goods brought from another State. *Stanley* v. *State*, 24 Ohio St. 166. In this connection, it is interesting to note that in a recent Massachusetts case not yet in the reports (*Commonwealth* v. *Parker*), a divided court (four against three) held that one who embezzled property in another State, and brought the embezzled property into Massachusetts, could be punished in Massachusetts for embezzlement.

DAMAGES — CONTRACTS — ANTICIPATORY BREACH. — Purchaser of a cargo "to arrive" repudiated the contract. Before its arrival, the seller brought suit, but did not sell elsewhere until after arrival. The market was steadily declining throughout this time. *Held*, that the difference between the contract price and the market value at the time of bringing suit (when the repudiation was acquiesced in) should be the measure of damages, as it was unreasonable for the seller to hold back the sale until the day fixed for delivery. *Roth* v. *Tayser*, 12 *The Times* L. R. 211.

The decision is important; it qualifies the general rule laid down in *Roper* v. *Johnson*, L. R. 8 C. P. 167. The exact point here decided has not come up in jurisdictions of this country recognizing anticipatory breach. A contrary view is strongly expressed by the court in *Kadish* v. *Young*, 108 Ill. 170. In so far as the decision makes the time of acquiescence the basis with regard to which the jury are to assess damages, it seems sound, for such acquiescence should terminate the rights and liabilities of the parties with respect to the contract. But it seems open to criticism, in that it makes such rule applicable to those cases only in which the seller would be acting unreasonably in not selling before the day fixed for the delivery by the terms of the contract.

EQUITY — AVOIDING DEED — DURESS. — Plaintiff's husband threatened that he would commit suicide unless plaintiff should execute a deed of her property to defendant to make good a sum embezzled from the defendant by the husband. Plaintiff executed the deed, and now asks that the defendant be compelled to reconvey to her. *Held*, one judge dissenting, that the husband's threats to commit suicide did not constitute duress. *Girty* v. *Standard Oil Co.*, 37 N. Y. Supp. 369.

The earliest notion of duress was peril of life or limb. In time it became the rule that such threats constituted duress as would put in fear a person of ordinary firmness; and the courts generally follow that to-day. *U. S.* v. *Huckabee*, 16 Wall. 423; Tiedeman on Real Prop., § 796, and cases cited. As the ground for allowing an instrument to be avoided for duress is that the maker did not exercise free will, it would seem that the mind of the particular person should be considered, regardless of what effect the threats might have had upon a person of ordinary firmness. 14 Am. Law Reg. 201.

EVIDENCE — DYING DECLARATIONS. — *Held*, that it was not error to admit a dying declaration to the effect that the prisoner had threatened to kill declarant, his wife, if she should leave him. *People* v. *Beverly*, 66 N. W. Rep. 379 (Mich.).

If dying declarations must relate to "the circumstances of the death," this statement was clearly inadmissible. In view of the fact that courts, during recent years, have so strictly limited and qualified this exception to the heresay rule, the correctness of this holding seems at least doubtful. *People* v. *Davis*, 56 N. Y. 95. In *Hackett* v. *People*, 54 Barb. 370, statements of this character were excluded.

FOREIGN CORPORATIONS — RIGHT TO DO BUSINESS IN STATE. — Where a foreign building and loan association has lent money on a mortgage in the State without complying with the statutory provisions relative to foreign corporations, *held*, that the mortgage may be foreclosed, but the recovery will be limited to principal and interest and taxes paid; it will not include bonuses, premiums, and other dues as provided by its by-laws. *Guarantee Co.* v. *Cox*, 42 N. E. Rep. 915 (Ind.).

The case is novel, but seems right. The first point is covered by the decision in *Elston* v. *Piggott*, 94 Ind. 14, which allows recovery for money lent, though the transaction of business be prohibited. The second point is covered by the statute, the association having no authority to do a building and loan business in the State.

JUDGMENT — ADMINISTRATION — COLLATERAL ATTACK. — Where A's land has been sold under a decree made at the instance of A's administrator, *held*, that A's children may attack the proceedings collaterally by showing that A did not in fact die till after the sale. *Springer* v. *Shavender*, 23 S. E. Rep. 976 (N. C.).

While this decision is in accord with the great weight of authority (see *Scott* v. *McNeal*, 154 U. S. 34, where the cases are collected), it is to be regretted that the other side of the question has not received more attention. In *Rodcrigas* v. *Savings Inst.*, 63 N. Y. 460, it was held that the surrogate had power judicially to determine the fact of death, and his judgment could not be collaterally attacked. The correctness of this view has been ably maintained in 14 Am. Law Rev. 337, and in 1 Woerner on Adm., 208 *et seq.*, where it is contended that jurisdiction in the surrogate to determine the fact of death is necessary to the exercise of his functions. See also dissenting opinion of Freeman, J., in *D'Arnement* v. *Jones*, 4 Lea (Tenn.), 251. In *Scott* v. *McNeal*, *supra*, the exercise of this power on the estate of a living person was held to be depriving a man of his property without due process of law. Under a proper form of notice it does not seem to differ from taking an absent debtor's property by attachment. 22 Central

Law Journal, 484; Vanfleet, Collateral Attack, § 608 *et seq.* One judge in the principal case dissented, on the ground that, though the owner himself could not be estopped, the children should be, as they were parties to the sale. The distinction can hardly be supported, since the objection to jurisdiction in the case, if admitted at all, would seem to strike at the root of the whole proceedings.

JUDGMENT LIENS — PRIORITIES. — *Held*, that when a junior lien has been enforced before a senior, the holder of the senior lien cannot compel a payment of his judgment out of the proceeds of sale in the hands of the junior lien-holder, but has a right to levy execution on the property in the hands of the purchaser. *Dysart* v. *Branderth*, 23 S. E. Rep. 966 (N. C.).

This case represents the great weight of authority on this point. In two States, South Carolina and Georgia, the opposite view is held, and a sale under the junior lien extinguishes the senior lien, leaving its holder to come upon the proceeds of the sale for satisfaction. *Blohme* v. *Lynch*, 26 S. C. 300; *Jones* v. *Wright*, 60 Ga. 364. The former view seems to regard a judgment lien as in nature a *jus in re*, — a doctrine which the text-writers expressly repudiate, although they cite and approve the cases *in accord* with the principal case. 1 Black on Judgments, § 400; Freeman on Judgments, § 338.

PARTNERSHIP — OSTENSIBLE PARTNERSHIP — RIGHTS OF FIRM CREDITORS. — *Held*, that the creditors of an ostensible partnership are not entitled to preference over the creditors of the true owner, on the latter's assignment in insolvency, in respect to the property used in the business of the ostensible partnership. *Broadway National Bank* v. *Wood*, 43 N. E. Rep. 100 (Mass.). See NOTES.

PROPERTY — CONTRIBUTION BETWEEN TENANTS IN COMMON. — Complainant, by a bill in equity, asked for the sale of certain property owned by him as tenant in common with the defendant. The bill also asked for a contribution by the defendant of his proportional part of sums expended by the complainant in necessary repairs and in taxes. The defendant in his answer asked for an account of rents, and alleged that the repairs had been made against his wish. *Held*, that a sale of the property should be made, and an account and settlement of the estate had. The complainant, in accounting for rents, may credit himself with the sums spent in repairs and taxes, but he cannot compel a direct contribution for them from the defendant. *Williams* v. *Coombs*, 33 Atl. Rep. 1073 (Maine).

A tenant in common cannot at law get cotribution from his contenant for unauthorized necessary repairs. *Leigh* v. *Dickeson*, L. R. 12 Q. B. D. 194; *Calvert* v. *Aldrich*, 99 Mass. 74. Nor is he entitled to it in equity, except as in the principal case, where the matter comes up on a bill for partition. Story, Eq. Jur. § 1237. This seems correct. A cotenant should not be obliged to go into his pocket for unauthorized repairs; but when the estate is to be divided, he cannot be allowed to acquire the improved property without paying in some way for the improvements. In *accord* with principal case, see as to repairs *Swan* v. *Swan*, 8 Price, 518, and as to taxes, *Kites* v. *Church*, 142 Mass. 586.

PROPERTY — EASEMENT OF LIGHT AND AIR — IMPLIED GRANT. — Where a tract of land owned in common was divided into two lots by an interchange of quitclaim deeds, and there was a store on one lot with windows receiving light and air across the other, *held*, that these windows cannot be closed by the owner of the latter lot if the light so received is reasonably necessary to the beneficial enjoyment of the building. *Greer* v. *Van Meter*, 33 Atl. Rep. 794 (N. J.).

It is plain that the reasons existing in this country for refusing to allow an easement of this kind to be gained by prescription are equally applicable to the facts of the principle case, yet such a prescriptive right is not recognized in New Jersey. *Hayden* v. *Dutcher*, 31 N. J. Eq. 217. The same question was decided the other way, and the inconsistency of the position taken in the principal case, pointed out in *Keats* v. *Hugo*, 115 Mass. 204, and *Mullen* v. *Stricker*, 19 Ohio St. 135.

PROPERTY — JOINT FINDERS — INTENT. — One of several boys playing along a railroad track picked up an old stocking in which something was tied, and, after he had swung it about in play for a time, another of the boys snatched it, or, it having been thrown away by the first boy, the second picked it up, and began striking the others with it. In this way it passed from one to another. Finally, while the second boy was swinging it, it broke open; and it was then found that the stocking contained money. All of the boys examined the contents of the stocking together, and the money was given to an officer to await the appearance of the true owner. The latter was never found. *Held*, that, efforts to find the true owner having been unavailing, the money belonged to the boys in common. *Keron* v. *Cashman*, 33 Atl. Rep. 1055 (N. J.).

The decision is rested on the ground that, as none of the boys treated the stocking

as anything but a plaything or abandoned article, the money within the stocking must be treated as lost property, which was not legally found until the stocking was broken open; that, the boys being then engaged in a common enterprise, the money came under the control of all, and each had the intention to take possession of part or all of it; the boys should therefore be treated as joint finders. The case, on this ground, appears to be sound in principle as on authority. *Merry* v. *Green*, 7 M. & W. 623; *Robinson* v. *State*, 11 Tex. App. 403; *Durfee* v. *Jones*, 11 R. I. 588.

PROPERTY — LANDLORD'S LIEN — BONA FIDE PURCHASER. — A tenant had a crop of corn stored on his premises, subject to a lien in favor of his landlord for unpaid rent. This corn was seized by a sheriff, under an attachment order obtained by the landlord. *Held*, that the sheriff could not hold the corn against one who had purchased it from the tenant without notice of the lien. *Scully* v. *Porter*, 43 Pac. Rep. 824 (Kan.).

The same result was reached by the Mississippi court in a recent case (*Chism* v. *Thompson*, 19 So. Rep. 210). The two cases seem correct. These liens, of course, depend wholly on statutes, but there seems to be no good reason, in the absence of express statutory language, why they should be treated differently from common law liens. It was held, however, in *Holden* v. *Cox*, 60 Iowa, 449, that, unless the goods on which the lien attached were such as the tenant was keeping for sale, the lien held good against a *bona fide* purchaser.

PROPERTY — PURCHASE FOR VALUE — JUDGMENT CREDITOR. — *Held*, that a judgment creditor is not a purchaser for value, and hence an unrecorded deed takes precedence over a subsequent judgment lien. *Smith* v. *Savage*, 43 Pac. Rep. 847 (Kan.).

This is the more logical position theoretically, as it is impossible to see how a judgment creditor can be considered a purchaser for value. Freeman on Judgments, § 366. The decision in this class of cases turns on the statute of the particular jurisdiction. In Massachusetts it is provided that an unrecorded deed shall be valid only against the grantor, his heirs and devisees. Mass. Pub. St. c. 120, § 4. The judgment creditor is necessarily protected under this statute. In New York, on the other hand, unrecorded deeds are void only against subsequent purchasers for value and in good faith, and there, consequently, the same result is reached as in the principal case. *Schroeder* v. *Guernsey*, 73 N. Y. 430.

QUASI-CONTRACTS — EXTINGUISHMENT OF CERTIFICATES OF INDEBTEDNESS THROUGH MISTAKE. — The defendant, the District of Columbia, issued certificates of indebtedness entitling plaintiff to payment for work done on a certain street out of a tax defendant should levy on the abutting property. As the tax was not paid, defendant sold the land to plaintiff, taking these certificates in payment, but title did not pass, since defendant had neglected to secure a lien for the amount of the tax, and the land had been sold to a *bona fide* purchaser for value, etc. *Held*, that, defendant being liable on the certificates because of its neglect, the surrender of them by plaintiff and their cancellation was between the parties like the payment of so much purchase money, and plaintiff can recover their value in assumpsit, his purchase having been to protect himself, and therefore not voluntary. *District of Columbia* v. *Lyon*, 16 Sup. Ct. Rep. 450.

In *McGhee* v. *Ellis*, 4 Litt. 244, the purchaser at an execution sale recovered from the judgment debtor by bill in equity, since the latter did not have title. It is contended that on principle such an action should be maintainable at law. Keener on Quasi-Contracts, 396. The court did not find it neccessary to rely on this analogy in the principal case, since it was the case of an involuntary payment to protect the interest of the purchaser. That the certificates were surrendered directly in payment would seem to be no reason for distinguishing the case from a cash payment and an extinguishment of the obligation with the money so paid. It seems difficult to distinguish the principal case on principle from *Homestead Co.* v. *Valley Co.*, 17 Wall. 153, where it was held that a payment of taxes by one who supposes he is owner is purely voluntary under mistake of law, and hence he cannot recover money so paid. If the cases are not reconcilable, the doctrine of the principal case is preferable. Keener on Quasi-Contracts, 380.

SURETYSHIP — SECURITIES GIVEN TO INDEMNIFY SURETY — RIGHTS OF CREDITOR. — The maker of a note deposited securities with his surety out of which the surety might reimburse himself in case he had to pay the note. Both maker and surety having become insolvent, the payee of the note filed a bill in equity asking that the securities be applied in payment of his note. *Held*, that upon the insolvency of the principal the surety had a right to apply the securities in payment of the note, and to that right the payee, especially in view of surety's insolvency, was entitled to be subrogated. *First Nat'l Bank* v. *Wheeler*, 33 S. W. Rep. 1093 (Texas).

The cases are in a hopeless state of confusion as to what circumstances, if any, give

a creditor the right to have securities deposited under a contract of naked indemnity applied in payment of the debt to him. It has been held that immediately on the deposit of the securities such an equitable right arises in favor of the creditor. *Moses* v. *Murgatroyd*, 1 Johns. Ch. 119; *Morrill* v. *Morrill*, 53 Vt. 74. Again, that such a trust arises in the event of the insolvency of the surety. *Lewis* v. *Deforest*, 20 Conn. 427. A third view is that if the estates of both the principal and surety are bankrupt, the creditor may compel the securities to be applied in payment of his debt (*Ex parte Waring*, 19 Ves. 345); and a fourth, that the surety, even in the event of a bankruptcy of both the principal and surety, has no recourse upon the securities except to reimburse himself for payments made on the creditor's claim; the particular creditor in such case has no higher right in the securities so held by the surety than has any other creditor of the surety. *Royal Bank* v. *Commercial Bank*, 7 App. 366; *Poole* v. *Doster*, 59 Miss 258.

The doctrine of *Poole* v. *Doster*, *supra*, is, it is submitted, the one to be preferred; it gives to the contract under which the securities were deposited the operation which the parties intended it should have; it is not open to the reproach of giving to the particular creditor a preference over other creditors for which he did not bargain, and which the principal and surety did not intend he should have. See 1 HARVARD LAW REVIEW, 326.

TORTS — LUNATIC'S LIABILITY FOR NEGLIGENCE. — *Held*, where a vessel in the exclusive control of one of the joint owners, who has chartered it, is lost through his negligence, he cannot defend an action by the other owners by showing that his want of care was due to temporary insanity, though such insanity was caused by his efforts to save the vessel. *Williams* v. *Hays*, 37 N. Y. Supp. 708.

In a former adjudication of this same case, the Court of Appeals left open the precise question now passed upon. *Williams* v. *Hays*, 143 N. Y. 442. There are few decisions on the subject of the liability of insane persons for torts by negligence, and the text-writers appear to be in great conflict. Some of the latter hold that insanity is no defence. 1 Shearman and Redfield on Negligence, § 121; Cooley on Torts, 2d ed., 117. Others incline to the view that insanity should in some cases be a bar. 1 Beven on Negligence, 2d ed., 52-55; Wharton on Negligence, § 88; 2 Jaggard on Torts, 872; Clerk and Lindsell on Torts, 11, 34. The true view seems to be expressed by Mr. Justice Holmes: "If insanity of a pronounced type exists, manifestly incapacitating the sufferer from complying with the rule which he has broken, good sense would require it to be admitted as an excuse." Holmes, The Common Law, 109.

TORTS — MALICIOUS INTERFERENCE WITH BUSINESS. — During a strike at plaintiff's manufactory, the defendants, officers of a trades society, picketed the works in the usual way, called out the workmen of another manufacturer merely because he worked for the plaintiff, and wrote threatening letters to the parents of minor employees. The plaintiff asked for an injunction to restrain the defendants from maliciously inducing persons not to enter into contracts with the plaintiff. *Held*, that, though the question of malice was generally one for a jury, still in a clear case the court ought to restrain by injunction the continuance of an act which was unlawful only because malicious. *Lyons* v. *Wilkins*, 12 *The Times* L. R. 222. See NOTES.

TORTS — MUTILATION OF DEAD BODY. — *Held*, that a wife may recover damages from one who unlawfully mutilates the dead body of her husband before burial. *Foley* v. *Phelps*, 37 N. Y. Supp. 471. See NOTES.

TORTS — WRONGFUL DISPOSAL OF PLEDGE — ACTION ON THE CASE. — A, owing B $16,000, deposits with B as collateral security a note for $25,000. B wrongfully surrenders the collateral note to its maker, but later obtains it from him again, and is ready to restore it to A upon the payment of his debt. *Held*, that, in trespass on the case, A can recover of B $9,000, the difference between the face value of the note and the amount of the debt, without first tendering payment for the debt or demanding the collateral. *Post* v. *Union National Bank*, 42 N. E. Rep. 976 (Ill.).

The decision is interesting as bearing on the question of what constitutes conversion by a pledgee, and what is his right of recoupment in damages. This subject was discussed in 9 HARV. LAW REV. 540. The form of action here chosen, viz. "case," was used for the express purpose of avoiding the possible objection which might be urged against trover, that the pledgor gets no right of possession before offering to the pledgee the amount of his indebtedness. Blackburn, J., in *Donald* v. *Suckling*, L. R. 1 Q. B. 614, 615; Pollock on Torts, 4th ed., 324, 325.

The effect of the defendant's getting possession of the note after once parting with it was carefully considered. As this was an action on the case where only actual damages can be recovered, it was insisted that as the defendant was prepared to return to the plaintiff the identical security which had been given, there was no real damage to

the plaintiff, and hence there should be no recovery. But the court said that the pledgor's cause of action arose when the pledgee first disposed of the note, and nothing subsequent could undo that transaction. The decision was probably correct, although the judge below reached the opposite conclusion. Just as in conversion one can practically force the wrongdoer to buy the converted article, so here in "case," when once the tortious act has been committed, the pledgee cannot take away the pledgor's right of action, or even mitigate damages by tendering the note, unless the pledgor elects to accept it. *Carpenter* v. *Dresser*, 72 Me. 377.

TRUSTS — PURCHASER FOR VALUE — NOTICE. — *Held*, that a purchaser of a mortgage belonging to a trust estate, who knows the mortgage to be trust property, but who has learned upon inquiry that the trustee has a general power to change the securities, is not protected where the instrument creating the trust provides that the written consent of the beneficiary to such change shall not be necessary. He is chargeable with the knowledge of the contents of such instrument. *Suarez* v. *De Montigny*, 37 N. Y. Supp. 503.

The view taken tends to make the trustee's right the test in such cases, rather than the purchaser's diligence. It closely resembles the doctrine of agency, which charges one who takes a negotiable instrument, signed "per proc." with knowledge of the contents of the power of attorney creating the authority so to sign. *Attwood* v. *Munnings*, 7 B & C. 278. The court, however, does not go to the extent of saying that one who knowingly deals with a trustee does so at his peril.

WILLS — ADEMPTION OF GENERAL LEGACY. — *Held*, that a general bequest to a child of a share of testator's personalty may be satisfied *pro tanto* by a conveyance of real estate during the life of the testator, where such is the clear intention. *Carmichael* v. *Lathrop*, 66 N. W. Rep. 350 (Mich.). See NOTES.

WILLS — CONSTRUCTION — VARYING TECHNICAL WORDS. — Devise to A, and, if she have heirs, to her heirs; but if she die without "heirs or heirs of her body," remainder over. A child was born and died. *Held*, that, taking the will in its entirety, with its disregard of precise terms, considering the testator's condition and circumstances, he meant "children"; and so A had but a life estate, and the rule in *Shelley's Case* was not to be applied to give a fee. *Campbell* v. *Noble*, 19 So. Rep. 28 (Ala.).

The case is an interesting instance of the variation by the court of the strict legal meaning of words of inheritance. Such a variation is warranted under certain circumstances. *Roberts* v. *Edwards*, 33 Beav. 259; *Symers* v. *Jobson*, 16 Simons, 267; 2 Jarman on Wills, 6th Am. ed., 91. When the words of a will do not convey a clear meaning in themselves, the court may consider the surrounding circumstances and the condition of the testator in order to discover his intent. Per Lord Wensleydale, in *Grey* v. *Pearson*, 6 H. of L. Cas. 106; Wigram on Extrinsic Evidence, §§ 10-14; 1 Jarman on Wills, 6th Am. ed., 413, note.

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# REVIEWS.

COMMENTARIES ON THE LAW OF PRIVATE CORPORATIONS. By Seymour D. Thompson, LL. D. San Francisco: Bancroft-Whitney Co. 1895-1896. 6 Vols., pp. cclii, 6886.

The appearance of this book was heralded by a bookseller's circular, announcing it as "The One and Only Great Work." Since its publication, commendation equally strong has been bestowed by eminent jurists. From this unqualified praise some dissent must be expressed. The book is *not* "the one and only great work," except in the sense that it undertakes to cover the whole ground and discusses various special topics more fully than any other treatise. As a discussion of the crucial difficulties of corporation law, and as a help to their solution, it is not superior to two other books already before the public. That Judge Thompson's work is of great value, no one can doubt. Lawyers cannot afford to ignore it. The writer of this notice has purchased the six volumes, and does not regret his bargain. But, while this book must be used alongside of